UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Tenaska Frontier Partners, Ltd.

v. Docket No. EL05-21-000

Entergy Gulf States, Inc, and
Entergy Services, Inc.

ORDER ESTABLISHING HEARING PROCEDURES

(Issued May 17, 2007)

1. In this order, the Commission sets for hearing a complaint filed by Tenaska Frontier Partners, Ltd. (Tenaska) against Entergy Gulf States, Inc. and Entergy Services, Inc. (collectively Entergy) requesting that the Commission reclassify certain facilities and order Entergy to provide transmission credits for the costs of the facilities.

I. Background

2. Tenaska is a party to an interconnection agreement (IA) with Entergy which was accepted pursuant to delegated authority.[1] The IA identifies certain facilities as interconnection facilities and directly assigns the cost of the facilities to Tenaska without requiring Entergy to provide transmission credits.

3. On November 8, 2004, Tenaska filed a complaint claiming that certain of these facilities are located beyond the point of interconnection with Entergy and should therefore be classified as Network Upgrades. Tenaska claims that, under the

[1] *Entergy Services, Inc.*, Docket No. ER98-4558-000 (May 15, 1998) (unpublished letter order).

Commission's interconnection policy[2] and *Duke Hinds II*,[3] Entergy should provide transmission credits, plus interest, to Tenaska for the cost of the directly-assigned facilities. Tenaska also asks the Commission to modify the IA to reclassify these facilities as Network Upgrades.

4. Tenaska argues that the IA contains provisions that explicitly permit it to unilaterally file for a change in rates at the Commission. Tenaska notes, however, that the IA refers only to section 205 of the Federal Power Act (FPA).[4] Tenaska states that the lack of reference to FPA section 206[5] may be an oversight, but that the fact that the IA does not mention section 206 is inconsequential because both sections 205 and 206 of the FPA have the same "just and reasonable" standard of review.[6]

II. Notice of Filings and Responsive Pleadings

5. Notice of Tenaska's filing was published in the *Federal Register*, 69 Fed. Reg. 67,566 (2004), with interventions, answers and protests due on or before November 26, 2004. The Louisiana Public Service Commission (Louisiana Commission) filed a notice

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[2] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs., ¶ 31,146 at P 746 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs., ¶ 31,160 (2004) (Order No. 2003-A), *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004) (Order No. 2003-B), *order on reh'g*, 111 FERC ¶ 61,401 (2005) (Order No. 2003-C), *see also Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004), *aff'd*, *National Association of Regulatory Utility Commissioners v. FERC*, Nos. 04-1148, *et al*., slip op. at 12-14 (D.C. Cir. Jan. 12, 2007).

[3] *Duke Energy Hinds, LLC v. Entergy Services, Inc.*, 102 FERC ¶ 61,068 at P 21 (2003) (*Duke Hinds II*), *order on reh'g*, 117 FERC ¶ 61,210 (2006) (*Duke Hinds III*).

[4] 16 U.S.C. § 824d (2000).

[5] 16 U.S.C. § 824e (2000).

[6] Article III, section L of the Tenaska IA provides the following language:

> Nothing contained here shall be construed as affecting in any way the right of Entergy or Tenaska to unilaterally make application to the [Commission] for a change in rates, terms or conditions of service under section 205 of the [FPA] ….

of intervention. Entergy filed a timely answer to Tenaska's complaint (Answer). On December 9, 2004, Tenaska filed a response to Entergy's answer (Reply). On December 23, 2004, Entergy filed an answer to Tenaska's answer (December Answer). On January 18, 2005, Tenaska filed a further response (January Reply). On February 2, 2005, Entergy also filed a further answer (February Answer).

6. In its Answer, Entergy argues that Tenaska requests transmission credits for sole use facilities associated with its interconnection, which is inconsistent with Commission policy and should be summarily rejected. Entergy maintains that granting Tenaska's complaint would violate the prohibition on retroactive ratemaking and the filed rate doctrine. According to Entergy, section 205 of the FPA requires it to charge Tenaska the Commission-approved and filed rates set forth in the IA and section 206 of the FPA only permits the Commission to fix rates and charges on a prospective basis. Therefore, Entergy argues that sections 205 and 206 preclude the requested reopening of the Tenaska IA. Entergy argues that Tenaska has already paid the rates at issue and the contested facilities have been constructed and are in service. Entergy states that, if transmission credits with interest were granted to Tenaska, Entergy would be required to refund previously Commission-accepted and already-collected charges.

7. In its Reply, Tenaska argues that Entergy's answer is simply a collateral attack on the Commission's generator interconnection policy. Tenaska argues that the Commission's ordering Entergy to provide transmission credits would not violate the filed rate doctrine because the transmission credits would be applied prospectively only, and, thus, there cannot be a revision to previously filed rates. Further, Tenaska states that the Commission would not be engaging in retroactive ratemaking because the transmission credits can only be applied against future transmission service.

8. In its December Answer, Entergy argues that Tenaska is not entitled to revise its IA pursuant to section 206 of the FPA without first demonstrating that such modifications are justified by the public interest -- a showing that it asserts Tenaska has not made.[7] Entergy explains that the IA specifically contains language in articles III and V that requires joint filings by the parties to the IA in order to implement modifications.[8] As such, it asserts, the public interest standard of review applies to Tenaska's complaint.

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[7] December Answer at 3 (*citing PPL University Park, LLC, v. Commonwealth Edison Company*, 109 FERC ¶ 61,190 (2004)).

[8] *Id*. at 4. *See* IA Article III, Section J ("[t]his Interconnection Agreement may be amended by and only by a written instrument duly executed by each of the parties hereto"); IA Article V.

Moreover, Entergy argues, the IA does not specifically reserve any FPA section 206 rights for Tenaska, but, rather, merely reserves section 205 rights. It asserts that, even if the IA specifically reserved Tenaska's section 206 rights to petition for IA modifications, the bilateral modification requirement in the IA imposes the public interest standard on any modifications sought unilaterally pursuant to FPA section 206. Therefore, Entergy argues, Tenaska's mere assertion that the deal within the IA became an unfavorable bargain is not, by itself, a sufficient justification to change an interconnection agreement. Thus, it argues that Tenaska should be bound to the terms of its Commission-accepted IA.

9. In its January Reply, Tenaska responds to Entergy's assertions that Tenaska did not have the right under the IA to bring its complaint, stating that the IA itself is part of Entergy's Open Access Transmission Tariff (OATT), which explicitly permits section 206 complaints. Further, Tenaska argues that the IA states that "[n]othing contained herein shall be construed as affecting in any way the right of Entergy or Tenaska to *unilaterally* make application to the [Commission] for a change in rates, terms or conditions of service under section 205 of the FPA. . . ."[9] Thus, it argues that the IA specifically preserves Tenaska's right to unilaterally file to change the rates. Tenaska states that it is not opposed to the Commission treating its complaint as a section 205-type filing because both sections 205 and 206 use the "just and reasonable" standard of review.[10]

10. In its February Answer, Entergy reiterates its argument that Tenaska expressly agreed to the direct assignment of the interconnection and sole-use facilities for which it now seeks credits by freely executing its IA, but is now attempting to renege on its prior commitments at the expense of Entergy's other customers. Entergy argues that Tenaska was well aware that it always had the ability to request that an unexecuted IA be submitted to the Commission in the event that Tenaska did not then agree with the terms and conditions of its IA, including the allocation of costs therein and that Tenaska did not avail itself of this express option under Entergy's OATT.

[9] IA, Article III, Section L.

[10] January Reply at 5.

III. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the Louisiana Commission's notice of intervention serves to make it a party to this proceeding.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Commission Determination

13. We find that Tenaska's complaint raises an issue of material fact that cannot be resolved based on the record before us. Specifically, we cannot determine, based on the record before us and the language of the IA, the intent of Tenaska and Entergy with respect to their rights to make future modifications, unilateral or otherwise, to the IA (either in an FPA section 205 or section 206 filing). The IA contains the following provision:

> Nothing contained here shall be construed as affecting in any way the right of Entergy or Tenaska to unilaterally make application to the [Commission] for a change in rates, terms or conditions of service under section 205 of the [FPA] . . . ."[11]

14. Any rights Tenaska may have to apply to the Commission for a change to this agreement stem from section 206 of the FPA, not section 205. Thus, the provision which expressly grants Tenaska the right to "unilaterally" request changes "under section 205" cannot be understood without the need to resort to extrinsic evidence to determine the parties' intent. Accordingly, we will set the complaint for investigation, and establish a trial-type evidentiary hearing to address this issue, under section 206 of the FPA. We note that the purpose of this hearing is to address this one issue – the parties' intent with respect to their rights to make future modifications to the IA. We will address the merits of the other issues raised in Tenaska's complaint (*i.e.*, the appropriate classification of certain facilities and the appropriate cost allocation), once the issue being set for hearing has been resolved.

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[11] Tenaska IA, Article III.L.

15. In cases where, as here, the Commission institutes an investigation on a complaint under section 206 of the FPA, section 206(b), as it was in effect at the time that Tenaska filed its complaint, requires that the Commission establish a refund effective date that is no earlier than 60 days after the date a complaint was filed, but no later than five months after the expiration of such 60-day period.[12] Consistent with our general policy of providing maximum protection to customers, we will set the refund effective date at the earliest date possible, *i.e.*, 60 days after the filing of Tenaska's complaint, which is January 7, 2005.

16. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. The Commission has not yet issued a decision on the merits in this proceeding because the resolution of the matter depended in the first instance on the Commission's decision in the *Duke Hinds* cases.[13] In that proceeding, which was not resolved until November 17, 2006, the Commission announced its policy regarding interconnection facility cost allocation and transmission credits. Furthermore, the parties failed to express clearly their intent as to their rights to seek modification to the Tenaska IA. We now anticipate that we will be able to issue a decision in this matter soon after we receive the Initial Decision from the presiding judge in the hearing ordered herein and after any briefs on and opposing exceptions. While we do not know with certainty the time that may be necessary for the presiding judge to conduct the hearing and issue a decision, we nevertheless estimate that we will be able to issue our decision by July 31, 2008.

17. Today we are issuing an order in Docket No. EL04-20-000 that establishes a hearing on a similar IA between Entergy and Carville Energy LLC. If the parties in these proceedings request consolidation and if the Chief Judge finds such consolidation to be reasonable, then we authorize the Chief Judge to consolidate this proceeding with the proceeding in Docket No. EL04-20-000.

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[12] Section 206(b) of the FPA was amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005), to require that in the case of a proceeding instituted on a complaint, the refund effective date shall not be earlier than the date of the filing of such complaint or later than five months after the filing of such complaint.

[13] *See supra* n.3.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held concerning Tenaska and Entergy's intent with respect to their rights to make future modification to the IA.

(B) A presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(C) The refund effective date established pursuant to section 206(b) of the Federal Power Act is January 7, 2005.

By the Commission.

(S E A L)

Philis J. Posey,
Deputy Secretary.